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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1430.

PRETERM, INC., ET AL.,
PETITIONERS,
v.
EDWARD M. KING, GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Rehearing.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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The petitioners herein respectfully move this Court for an order vacating its denial of the petition for a writ of certiorari entered on May 14, 1979, and granting the petition. As grounds for the motion, petitioners state the following:

The Appeal Filed in Zbaraz v. Quern.

On April 30, 1979, the United States District Court for the Northern District of Illinois, following a remand from the United States Court of Appeals for the Seventh Circuit, entered

a final judgment and order in *Zbaraz* v. *Quern*, No. 77 C 4522. The District Court held that the Hyde Amendment and the Illinois statute which embodied the funding limitations of the Hyde Amendment were unconstitutional. The defendants in that action have filed a notice of appeal to the Supreme Court of the United States, invoking this Court's mandatory appellate jurisdiction under 28 U.S.C. § 1252.[1] The petitioners here submit that the decision and appeal in the *Zbaraz* case eliminate the respondents' principal objection to certiorari and, thus, provide ample justification for reconsideration of the denial of certiorari.

In this case, as in *Zbaraz* v. *Quern*, there are two issues, one statutory and one constitutional. The statutory issue is whether the Hyde Amendment operates as a substantive amendment to the provisions of Title XIX of the Social Security Act and thereby relieves the states of the obligation to fund medically necessary abortions. The constitutional issue is whether such a restriction of funding for medically necessary abortions violates the Fourteenth Amendment to the United States Constitution. The Court of Appeals for the First Circuit decided only the statutory question and remanded the case to the district court for consideration of the constitutional question posed by its interpretation of the Hyde Amendment as a substantive amendment to Title XIX. Certiorari was sought to obtain review of the decision of the court of appeals.

The respondents' principal objection to the petition for a writ of certiorari was that the decision of the court of appeals was "interlocutory in nature" and that the case was not ripe for review by this Court because the constitutional question had not yet been decided. Certiorari should be denied, they

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[1] The defendants in *Zbaraz* applied to this Court for a stay of the order of the district court. The application for a stay was denied by Justice Stevens in chambers on May 24, 1979, and by the full Court on June 4, 1979. *Williams* v. *Zbaraz*, No. A-958; *Quern* v. *Zbaraz*, No. A-967 (October Term, 1978).

argued, in order to avoid piecemeal decision making.[2] The appeal in *Zbaraz*, however, strips this argument of all force.

Because the Court of Appeals for the Seventh Circuit, in deciding *Zbaraz*, followed the decision of the First Circuit in *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121 (1st Cir. 1979), the issues in the two cases are identical. In both cases, the circuit court held that the Hyde Amendment had substantively modified the requirements of Title XIX. In both cases, the state restriction of payment for abortions for Medicaid recipients was held by the court of appeals to conflict with the requirements of Title XIX as so amended, and, in both cases, the court's order only required the state to pay for abortions covered by the Hyde Amendment. In both cases, there was a remand to the district court. Thus, the plaintiffs in the two cases are challenging identical state funding restrictions. The only difference between this case and *Zbaraz* is that the district court has ruled on the constitutional questions in *Zbaraz*, and an appeal has been taken from that ruling.

The *Zbaraz* appeal thus presents for decision by this Court the constitutional question which is not presented here. In turn, this case presents for review by the Court the question of statutory construction which is the predicate of the district court's decision in *Zbaraz*. Plainly, the two questions should be considered together, as this Court must resolve the statutory question before reaching the constitutional issues presented by the *Zbaraz* appeal. *See Hagans* v. *Lavine, supra.*

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[2] The filing of a petition for certiorari in this action prior to litigating the constitutional issue in the district court follows the well-established rule that the courts should not pass on the constitutionality of a statute where a case may be resolved on nonconstitutional grounds. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963). If a case may be decided on either statutory or constitutional grounds, the court should base its decision on statutory grounds so as to avoid a constitutional decision. *Hagans* v. *Lavine*, 415 U.S. 528, 543 (1974); *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121, 134 (1st Cir. 1979).

As the two cases present both the statutory and constitutional issues, the very considerations of judicial economy advanced by the respondents in urging the denial of certiorari now compel the opposite conclusion. It would be a waste of judicial resources to return this case to the district court for consideration of an issue which is now before the Court and is ripe for decision. Under these circumstances, the petitioners submit that it would be appropriate for the Court to consider the petition for a writ of certiorari at the same time that it considers the jurisdictional statements to be filed by the appellants in *Zbaraz*. Should the Court note probable jurisdiction in that case, the petition for certiorari should be granted and the two cases should be heard and decided at the same time. This procedure would follow the Court's practice in its consideration of related cases. *See, e.g., Beal* v. *Doe*, 432 U.S. 438 (1977), and *Maher* v. *Roe*, 432 U.S. 464 (1977); *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Conclusion.

For the reasons set forth above, and for those stated in the petition for a writ of certiorari, the petitioners request that this Court grant a rehearing of the denial of certiorari, vacate that

order, grant the petition and review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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Certificate of Counsel.

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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